No. 80-1687

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Despite obvious similarities, this case is not a clone of *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3789 (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981) ("Aeronautical Radio"). The paramount issue in this case is the role of the courts in reviewing FCC acceptance of a Bell System rate filing that, on its face, violates substantive agency directives (not mere procedural tariff filing rules) and will result in immediate and substantial competitive injury. No such issue was presented in *Aeronautical Radio*.

Beyond that, this case presents the Court with a recurring pattern of agency misconduct that has an importance for the administrative process transcending the particular issues. Over a long period of time, the FCC has exercised its regulatory authority in this area of telecommunications in a manner that warrants review by this Court. As fully demonstrated in the petition for certiorari (Pet. 4, 12 n.19), the Commission has simultaneously (a) failed to investigate and act upon repeated

complaints by competitors challenging Bell's rate filings, (b) successfully warded off judicial review by assuring the Court that these complaints were still "pending" at the Commission, and (c) thereafter continued its "back-burner" policy of doing absolutely nothing in the way of investigation and resolution of the complaints. The decision below leaves the complainants helpless and without any legal remedy. This situation, we respectfully submit, is intolerable and should not be allowed to go unreviewed.

I.

Western Union pointed out in its petition that the tariffs filed by Bell were, on their face, wholly irreconcilable with the FCC's 1974 directive that Bell cease discriminating between its Long Lines Department and its competitors. *See* Pet. at 10. The FCC's duty to reject thus was mandated not merely by Bell's failure to "compl[y] literally with threshold filing requirements," such as 47 C.F.R. § 61.38,[1] but, more importantly, by its utter disregard of the substantive requirements of the FCC's non-discrimination policy. The precedent established by the Court of Appeals' refusal to review the FCC's decision goes far beyond *Aeronautical Radio*: it permits an agency to flout its own substantive policies and deprive those whom a policy was designed to protect of effective or timely redress.

The injury here is not merely substantial overcharges, as in *Aeronautical Radio* and *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. ——, 101 S.Ct. 784 (1980), but *irreparable* competitive injury. While the statutory complaint procedure may adequately protect the interests of customers, as in *Aeronautical Radio* and *Papago*, it is wholly inadequate to protect the interests of competitors. *See Atchison, Topeka & Santa Fe Railway v. Wichita Board of*

[1] *See* Brief of the Federal Communications Commission in Opposition ("FCC Opp.") at 4.

Trade, 412 U.S. 800, 824 n.17 (1973) (plurality opinion). That consideration is particularly important in this case where the party filing the increased rates—the Bell System—dominates the telecommunications industry and the party that must bear the full brunt of the higher rates—Western Union—is the only carrier competing with the Bell System nationwide in offering the services affected by the new rates. This petition thus presents questions that go beyond mere rate regulation, as in *Aeronautical Radio.*

II.

For four years, Western Union and other carriers have sought administrative review of the lawfulness of these rates without success. Repeatedly, the Commission has promised to investigate these rates,[2] but other than its adoption of an order in 1977 formally opening an investigation,[3] the Commission has allowed the investigation to remain dormant since that time. Now, without having done anything to advance the investigation and without challenging the contention in our petition that "in all probability [the investigation] will continue to be totally inactive indefinitely" (Pet. at 12 n.19), the Commission describes this case as involving nothing more than "a transitory rate disagreement" (FCC Opp. at 4).

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[2] The Commission first promised to investigate the rates involved here in 1977, even before AT&T sought to apply them to Western Union. That promise was uttered on the eve of oral argument in *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978), and the Second Circuit relied upon the promise in affirming an FCC order permitting AT&T to apply the rates to several international telegraph carriers. *See* 568 F.2d at 1014. A similar promise was made in the order here for review. *See, e.g.*, Pet. App. 22a, 23a, 28a. At oral argument in the Court of Appeals more than two years ago, Commission counsel in this case, responding to a question from the bench, advised the court that it could reasonably assume that the "pending" rate investigation, though dormant at the time, would be concluded in one to two years.

[3] *AT&T Offer of Facilities for Use by Other Common Carriers*, 66 F.C.C.2d 1018 (1977).

In light of four years of inaction, the FCC should not be heard to contend that "the complaint remedy" protects Western Union from the competitive injury it has been suffering and will continue to suffer. *See* FCC Opp. at 5. There is no reason to credit the Commission's implied promise to act on rate complaints, given its failure to investigate the challenged rates despite its promises to do so. In short, absent judicial intervention, there will be no investigation and no action on Western Union's September 1980 complaint.[4]

The decision below leaves a gaping hole in the statutory scheme, which contemplates effective (and therefore timely) judicial review of the Commission's ratemaking orders. As noted in our petition, the FCC has not in recent history used its investigation and prescription authority to control Bell rates. It has merely accepted some Bell filings and rejected others. *See* Pet. at 7-9. Thus, the decision whether to accept or reject is critical. Since Congress did not delegate unreviewable ratemaking discretion to the FCC,[5] the Commission should not be free to insulate critical ratemaking orders from judicial review, at least in this instance, where more than mere overcharges are involved.

The problem of FCC inattention to its statutory duties was not presented in the several ICC cases or the recent *Aeronautical Radio* case on which the Commission relies. To be sure, the rates for Bell's Telpak services at issue in *Aeronautical Radio* had been disputed for more than

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[4] Western Union's complaint, which merely tracks its previous attack on these rates, was filed to avoid any possibility that its claims might be barred by the statute of limitations in 47 U.S.C. § 415. The implication in AT&T's brief in opposition that our complaint acknowledges the workability of the complaint remedy (AT&T Opp. at 2, 6) is without foundation.

[5] *See* Communications Act § 402(a), *as amended*, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

20 years without a final FCC decision, but none of the petitioners for certiorari had been prejudiced by that delay, nor were they complaining of it. By contrast, this case squarely presents the important question of whether the FCC (or any other agency) should be allowed to invoke the rule of non-reviewability articulated by the Court of Appeals in *Aeronautical Radio* and by this Court in decisions under the Interstate Commerce Act where the end result is to permit the agency to disregard its fundamental ratemaking responsibilities.

CONCLUSION

The Solicitor General "cannot ask the Court to grant certiorari in this case" because of a belief that the denial of certiorari in *Aeronautical Radio* portends a similar action here. As has been shown, however, this case presents reasons for review that were absent from those cases.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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